

The Deadly Woods

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Since August 2021, hundreds of people have attempted, and many have succeeded, to irregularly cross the border from Belarus to Poland. In retaliation, they are pushed back to Belarus by Polish authorities and then forced to cross back to Poland by Belarusian authorities. Forced to repeatedly wander in minus temperatures through thick woods, many persons have been seriously injured and at least several have died. In reaction to the situation, instead of addressing the humanitarian crisis, Polish authorities have responded with force: declaring a [state of emergency](#) in the region, which prohibits media and NGOs from coming close to the border, deploys [troops](#) and plans to build a [wall](#).

Within this process, pushbacks have also been legalized. As of the end of October 2021, there are two parallel frameworks legalizing pushbacks in Poland. The interim measure, based on COVID-regulations, allows the return to the border of foreigners that have crossed the border from Russia, Belarus or Ukraine after 20 August 2021 and do not fall into one of the categories mentioned in the relevant Regulation. The permanent measure, based on the Act of Parliament which entered into force on 25 October 2021, provides for the return of persons apprehended immediately after crossing the border irregularly. Currently both the Executive Regulation and Act of Parliament, which contain different regulations, remain in force in parallel.

What are pushbacks?

The – not legally defined – term “pushback” is used to describe practices by various countries (and [Frontex](#)), when persons who are either trying to cross an international border, or who have crossed one, are returned, without processing their asylum claims. As states are under international obligation to process asylum claims, [such practices](#) are illegal.

The term pushbacks has been coined with regard to water borders, when boats are “pushed” away from a border line. However, today it is frequently used in a context, which does not really involve “pushing” – it involves putting persons in a car and driving them, sometimes several kilometers, to an international border. As has been [widely reported](#), the procedures often involve physical violence, ill-treatment, seizure of cell phones as soon as the persons are apprehended and the destruction of their belongings.

Pushbacks at the Polish-Belarusian border

The pushbacks at the Polish-Belarusian border consist of forcing people to walk or driving them by car to the border and forcing them to cross it. As such, they reflect what is happening at other EU borders, in particular at the [Balkan route](#). They show,

as [argued](#) by Dimitry Kochenov and Barbara Grabowska-Moroz, how the situation at the Polish-Belarusian border is a reflection of the chronic EU-wide Rule of Law deficiency. Also in legalizing pushbacks, Poland has followed other EU countries, such as Hungary and Spain.

At the same time, there are distinct elements in the situation at the Polish-Belarusian border. The country from which the asylum seekers are crossing the border, Belarus, is actively engaged in bringing them to the border. The regime – headed by Aliaksandr #ukašenka, who is not recognized by the European Union as the legitimate president of Belarus – issues touristic visas to persons from crisis regions, so that they can fly to Minsk, and then provides them with transport to the border. It has also been reported that persons returning from Poland are forced to cross again. Reportedly, Belarusian border guards use physical violence to force people to attempt another crossing and, in some cases, drug them with [psychotropic medication](#). The involvement of Belarus and the violence that pushed-back persons experience on the Belarusian side needs to be taken into consideration when assessing Poland's responses to the situation.

Executive Regulation

While the attempts to legalize pushbacks in Poland have been noted in international news [recently](#), the first steps have been taken in [August](#). On 20 August 2021 the Minister of Interior [amended](#) an [Executive Regulation](#) from March 2020, adopted within its response to the COVID pandemic.

The original Regulation suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine. On those border crossings, where entering Poland is restricted, only selected categories of persons are allowed to cross (the list has been regularly extended, see [here](#) for the most recent list). Asylum seekers are not on the list, meaning that they cannot enter at those border crossings, which is a violation of Poland's international obligations. In “particular justified cases” foreigners not listed in the Regulation can be allowed to enter Poland. This decision is taken by the commanding officer at the relevant Border Guard post, after obtaining the consent of the Commander-in-Chief of the Border Guard. While full information is not available, it is highly unlikely that asylum seekers entered Poland under this exception.

The regulation's [amendment from August 2021](#) allows the return of all persons not listed in the Regulation who have crossed the border, which implicitly covers also asylum seekers. Importantly, the amendment does not only concern people at the suspended and restricted border crossing points, but also “beyond the territorial range of the border crossing”. Consequently, every person identified on the territory of Poland, who does not fall into one of the categories and has crossed the border from Russia, Belarus or Ukraine after 20 August 2021, can be returned to the border on the basis of the Regulation.

Act of Parliament

In parallel to amending the executive Regulation (20 August 2021), the government submitted a [project](#) of a law legalizing pushbacks to the parliament (23 August 2021). After a speedy discussion in the lower chamber (Sejm), where the ruling party has a majority, the draft law was brought to the higher chamber (Senat), where the opposition has a slight majority. The Senat proposed on 8 October 2021 an [amendment](#), according to which people travelling with children cannot be pushed back, which was rejected by the Sejm. The law was signed by the president on 21 October 2021 and entered into force on 25 October 2021.

According to the law, when persons are apprehended immediately after crossing an external border in violation of the law, the local Border Guard chief issues an order according to which the persons have to leave Poland. After receiving such an order, they are prohibited to re-enter Schengen area countries during a specified period (between 6 months to 3 years). The order may be appealed to the Commander-in-Chief of the Border Guard, but this does not suspend its execution. The Regulation in Act of Parliament is more narrow than the executive regulation, which does not require apprehension immediately after crossing the border. At the same time however, it is much more general than the executive regulation, which was an amendment to COVID rules and as such is supposed to be an interim measure.

The law also deals explicitly with asylum seekers, by allowing the border guards to disregard application for international protection from people apprehended immediately after crossing an external border in breach of the law. That clearly violates Poland's international obligations, as highlighted by the [Polish Ombudsman](#), [several NGOs](#) and the [UNHCR](#). The one exception with regard to asylum seekers in the Act concerns persons coming directly from the territory of a country where their life or freedom is threatened with persecution or the risk of serious harm. Additionally, they need to present credible reasons for their "illegal" entry to Poland and submit their asylum claims immediately after crossing the border. It is highly unlikely that asylum seekers would be able to meet these conditions.

Two parallel frameworks legalizing push-backs

Currently, two legal frameworks legalizing pushbacks in Poland exist in parallel. The first, based on COVID-regulations, allows the return of anyone not fitting into any of the categories of persons allowed to cross the border, who has crossed the border from Russia, Belarus or Ukraine after 20 August 2021. The second, based on an Act of Parliament, allows the return of persons apprehended immediately after crossing the border irregularly. The pushbacks within the second legal framework are performed on the basis of an order and result in a prohibition to re-enter the Schengen area – pushbacks within the first one do not. Both regulations violate Poland's international obligations, with the Act of Parliament doing so explicitly. At this point, it cannot be assessed, which one of these two regulations will be applied and under what circumstances.

Last but not least, none of the two instruments affects the Polish Penal Code and the Petty Offences Code. Crossing the Polish border irregularly constitutes a violation of the [Art 49a of the Petty Offences Code](#) and may also constitute a violation of [Article 264 of Penal Code](#) (crossing borders in violation of law, using violence, threats, deception or in cooperation with other persons). Claimants of asylum are exempted from those rules, as Poland is part to the [Refugee Convention](#) (see art. 31.1). Thus, according to Polish law, when an irregular crossing is disclosed, state authorities are under an obligation to initiate proceedings under the Petty Offences Code (and possibly Polish Penal Code), unless the persons are claiming asylum. By returning persons who have crossed irregularly without initiating either criminal or asylum procedures, both the executive Regulation and the Act of Parliament are inconsistent with Polish law.

